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In the Supreme Court of the United States

OCTOBER TERM, 1968

THE SCAM INSTRUMENT CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. 12-17) is officially reported at 394 F. 2d 884. The Board's decision and order (Pet. App. 1-30) are reported at 163 NLRB No. 39.

JURISDICTION

The decision of the court of appeals was rendered on May 15, 1968 (Pet. 12). A petition for rehearing

en banc was denied on June 26, 1968 (Pet. 18). The petition for a writ of certiorari was filed on September 23, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an employer violates his bargaining obligation under the National Labor Relations Act when, during the term of a collective bargaining contract, he changes the insurance benefits which his employees were entitled to under the contract without notifying or consulting with the union representative.

STATUTE INVOLVED

Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*) are set forth at page 11 of the petition; section 8(d) of the Act, in pertinent part, is as follows:

> (d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided,* That where there is in effect a collec-

tive-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later: * * *

STATEMENT

The employees at the Company's Skokie, Illinois plant have been represented by Local 1031, Interna-

tional Brotherhood of Electrical Workers, AFL-CIO since 1955 (Pet. App. 5). The collective bargaining agreement between the Company and the Union for the two-year period ending September 1, 1966, contained a provision obligating the Company to maintain specified insurance coverage for the employees (Pet. App. 6-7). The kinds of coverage and the benefits payable were set forth in an attached schedule (Pet. App. 6). At an employee's election, his dependents could also be covered at a stated monthly premium to be paid by him through the company.

In February 1965, without notification to or consultation with the Union, the Company and its insurance carrier agreed to add a "non-duplicating" rider to the medical and health service benefits payable under the policy (Pet. App. 7-8; B.A. 77-79, 84-88).[1] Under this rider, benefit payments could be reduced in the event the employee or his dependent had similar coverage under another group insurance system involving employer contributions, so that the employee would not receive more than 100% of his medical expenses in benefits[2] (Pet. App. 8-10).

The Union first became aware of the policy change in early May 1965, when a Company employee reported receiving a reduced insurance payment (Pet. App. 10). The Union complained to the Company's manager, who promised to investigate the matter

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[1] References designated "B.A." are to the appendix to the Board's brief in the court below.

[2] Whether the reduction would be made under the employee's plan or his dependent's is determined according to stated priorities (B.A. 87).

(Pet. App. 11). On May 18, the Company asked the insurance carrier to remove the rider retroactively from the policy (Pet. App. 7). The carrier complied, but the Union was not told of its action (Pet. App. 11). On June 3, the rider was reinstated at the Company's request, but again the Union was not notified or consulted about the change (Pet. App. 11).

The Board concluded that the Company's addition of the non-duplicating rider to the insurance policy without first notifying or consulting with the Union constituted a unilateral change in the terms and conditions of employment of the Company's employees, in violation of Section 8(a)(5) and (1) of the Act. The Board also concluded that the Company's action violated Section 8(d), because the addition of the rider constituted a modification of the collective bargaining contract without compliance with the procedures set forth in that section. (*Supra*, pp. 2-3; Pet. App. 17-19.) The Board ordered the Company to cease and desist from the unfair labor practices found, to remove the non-duplicating rider retroactively, to reimburse employees for any medical benefits they lost as a result of the rider, and to post appropriate notices (Pet. App. 28-30, 2).

The court of appeals sustained the Board's unfair labor practice findings, and enforced its order (Pet. 12-17).

ARGUMENT

The obligation to bargain collectively with respect to "wages, hours, and other terms and conditions of employment," which Sections 8(a)(5) and 8(d) of

the Act impose on an employer, carries with it the duty to refrain from taking action on those subjects without first notifying and consulting with the employees' union representative. It is undisputed that, after the Company and the Union agreed to an insurance program for the employees and incorporated that program in a collective agreement, the Company unilaterally added a rider to the insurance policy which had the effect of changing the insurance benefits payable to the employees. Such unilateral action violated Sections 8(a)(5) and 8(d) of the Act. See *National Labor Relations Board* v. *Katz*, 369 U.S. 736, 747 (1962); *National Labor Relations Board* v. *C & C Plywood Corp.*, 385 U.S. 421, 425-430 (1967).

The company contends (Pet. 6), however, that the non-duplicating rider was not a matter covered by the collective bargaining contract, since it "in no way reduced the amount of coverage available to Scam employees, but simply eliminated the unintended dollar profit paid to a small minority of employees" who had double insurance coverage. But the contract set forth in detail the specific benefit payments to which employees were entitled under given circumstances, and, insofar as medical and health service was concerned, there was no provision for reduction in benefits in the event of coverage under other insurance plans. However described, the effect of the Company's unilateral addition of the non-duplicating rider was to introduce a qualification not previously specified, and to reduce the total payments which certain employees would otherwise have received under the orig-

inal plan (Pet. App. 8-10). Thus, the Board—which was empowered to construe the collective agreement in deciding this unfair labor practice charge, *National Labor Relations Board* v. *C & C Plywood Corp.*, *supra*, at 428—correctly concluded, as the court below found, that the agreement covered the insurance benefits which the Company changed, and hence the Company could not lawfully make that change without first bargaining with the Union.[3]

Thus, while the employer's desire for the rider can be understood and even approved, he went about imposing it in the wrong way. There is no issue here worthy of the Court's consideration.

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[3] Bargaining over the reduction would not necessarily have been a mere formality. The Company apparently wished to save premium expense by improving its claims record on the insurance policy. The Union might well have acquiesced in the rider, but sought some compensating advantage, for example a reduction in the premiums its members paid for covering their dependents under the Company's group policy.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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